



## IN THE COURT OF CRIMINAL APPEALS OF TEXAS

---

---

NO. WR-86,575-01

---

---

**EX PARTE BRIAN SUNIGA, Applicant**

---

---

**ON APPLICATION FOR WRIT OF HABEAS CORPUS  
CAUSE NO. 2012-434,109 IN THE 140<sup>th</sup> DISTRICT COURT  
LUBBOCK COUNTY**

---

---

*Per curiam.*

### **ORDER**

This is an application for a writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071.

In May 2014, a jury convicted Appellant of capital murder. TEX. PENAL CODE § 19.03(a)(2). At punishment, the jury answered the special issues submitted pursuant to Texas Code of Criminal Procedure Article 37.071, and the trial court, accordingly, set Applicant's punishment at death. This Court affirmed Applicant's conviction and sentence on direct appeal. *Suniga v. State*, No. AP-77,041, slip op. (Tex. Crim. App. Mar. 6, 2019) (not designated for publication). In the instant application for habeas relief, Applicant presents ten allegations in which he challenges the validity

of his conviction and resulting sentence. The trial court held an evidentiary hearing. The trial court adopted the State's findings of fact and conclusions of law recommending that the relief sought be denied.

Applicant raises multiple claims of ineffective assistance of trial counsel under Claim One.

He asserts that trial counsel: botched an attempt to utilize Defense Initiated Victim Outreach; failed to secure and maintain their client's trust; failed to formulate a defense theory; remained passive (and even complicit) in the State's attempt to demonize Applicant; failed to present or cross-examine witnesses at the guilt-innocence phase of trial; presented prejudicial expert witnesses testimony at the guilt-innocence phase of trial; failed to investigate and rebut the State's evidence of alleged gang membership; failed to impeach a jailer with the contents of his personnel file; and failed to utilize continuances to investigate and marshal mitigating evidence. Additionally, in Claim Five, Applicant claims that trial counsel were ineffective for failing to object to the State's use of peremptory strikes to remove minority venire members in violation of Applicant's constitutional rights. This Court has reviewed the record with respect to the allegations of ineffective assistance of counsel. We deny relief on these claims because Applicant has not met his burden under *Strickland v. Washington*, 466 U.S. 668 (1984). He failed to show a reasonable probability that, but for his trial counsel's alleged deficient performance, the result of his trial would have been different. *Id.* at 689.

In Claim Two, Applicant argues that his due process rights were violated via prosecutorial misconduct. First, Applicant complains that the State committed a *Brady* violation by withholding impeachment evidence. We deny relief on this claim because Applicant has not met his burden to show that (1) the State failed to disclose evidence; (2) the withheld evidence was favorable; and (3) the evidence was material. *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999); *Diamond v. State*, 613

S.W.3d 536, 545 (Tex. Crim. App. 2020). Second, Applicant complains that the State made material misrepresentations of fact regarding peremptory strikes and Applicant’s jail visitation statements. We deny relief on this claim because Applicant has not shown that the alleged misconduct was of sufficient significance to compromise the fairness of the proceedings. *See Greer v. Miller*, 483 U.S. 756, 765 (1987).

In Claim Three, Applicant contends that his Sixth Amendment right to a fair trial was violated because his jury was exposed to external influences and engaged in premature deliberations. The trial court found that the State met its burden to show that external contact with the juror was harmless. *Remmer v. U.S.*, 347 U.S. 227, 229 (1954); *Balderas v. State*, 517 S.W.3d 756, 782 (Tex. Crim. App. 2016). Additionally, the record did not support a conclusion that the jurors engaged in premature deliberations. Thus, Applicant did not meet his burden to prove juror impartiality. *U.S. v. Lee*, 966 F.3d 310, 321 (5th Cir. 2020); *see also Ex parte Garza*, 620 S.W.3d 801, 827 (Tex. Crim. App. 2021) (citing *Ex parte Maldonado*, 688 S.W.2d 114, 116 (Tex. Crim. App. 1985) (“In a post-conviction collateral attack, the burden is on the applicant to allege and prove facts which, if true, entitle him to relief.”)). Therefore, we deny relief on this claim.

Applicant also raises six additional challenges to his conviction and death sentence. In Claim Four, he argues that the trial court committed misconduct when it interviewed a juror outside the presence of the Applicant and his trial counsel. In Claim Six, he argues that his constitutional rights were violated when the trial court was prohibited from instructing the jury that “a vote by one juror would result in a life sentence” (the 10-12 Rule). In Claim Seven, he argues that his death sentence violated the Equal Protection component of the Due Process Clause of the United States Constitution due to pervasive racial discrimination in the Lubbock County District Attorney’s Office’s

determinations as to which capital defendants it seeks the death penalty. In Claims Eight and Nine that the Texas death penalty scheme is unconstitutionally arbitrary because it fails to provide a consistent state-wide method for determining the cases in which the death penalty will be sought and is unconstitutionally vague. Finally, in Claim 10, he argues that his death sentence should be vacated because the punishment phase jury instruction restricted potential mitigating evidence. We will not review the merits of these habeas claims because they were either raised and rejected on direct appeal or Applicant failed to raise them. *See Ex parte Acosta*, 672 S.W.2d 470, 472 (Tex. Crim. App. 1984) (holding that we need not address habeas claims that were raised and rejected on direct appeal); *Ex parte Reynoso*, 257 S.W.3d 715, 723 (Tex. Crim. App. 2008) (citing *Ex parte Torres*, 943 S.W.2d 469, 475 (Tex. Crim. App. 1997)); *Ex parte Nelson*, 137 S.W.3d 666, 667 (Tex. Crim. App. 2004) (citing *Ex parte Goodman*, 816 S.W.3d 383, 385 (Tex. Crim. App. 1991)).

Based upon the trial court's findings and conclusions and our own review, we deny relief.

IT IS SO ORDERED THIS THE 8<sup>th</sup> DAY OF JUNE, 2022

Do not publish